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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 PAUL PATRICK JOLIVETTE,

12 Petitioner,

13 v.

14 DANNY SAMUEL,

15 Respondent.
16

No. 2:23-CV-1732-KJM-DMC-P

FINDINGS AND RECOMMENDATIONS

17 Petitioner, a prisoner proceeding pro se, brings this petition for a writ of habeas
18 corpus under 28 U.S.C. § 2254. Pending before the Court is Respondent's motion to dismiss.
19 See ECF No. 20. Petitioner has filed an opposition. See ECF No. 25. Respondent argues this
20 action must be dismissed because underlying state court criminal proceedings have not yet
21 concluded.

22 Principles of comity and federalism require that this Court abstain and not
23 entertain Petitioner's habeas challenge to a state court criminal conviction which is not yet final
24 unless he shows that: (1) he has exhausted available state judicial remedies, and (2) "special
25 circumstances" warrant federal intervention. See Carden v. Montana, 626 F.2d 82, 83-84 (9th
26 Cir.1980); see also Younger v. Harris, 401 U.S. 37, 46 (1971); Kowalski v. Tesmer, 543 U.S.
27 125, 133 (2004). Only in cases of proven harassment or prosecutions undertaken by state
28 officials in bad faith without hope of obtaining a valid conviction and perhaps in other special

1 circumstances where irreparable injury can be shown is federal injunctive relief against pending
2 state prosecutions appropriate. See Carden, 626 F.2d at 84 (citing Perez v. Ledesma, 401 U.S. 82,
3 85 (1971)).

4 Respondent outlines the following relevant procedural history, which is not
5 contested:

6 On April 25, 2005, a Solano County jury found petitioner guilty of
7 showing harmful matter with the intent of seducing a minor (Cal. Penal
8 Code § 288.2(a)), sexual penetration by a foreign object by means of force
9 (Cal. Penal Code § 289(a)(1)), three counts of forcible rape (Cal. Penal
10 Code § 261(a)(2)), false imprisonment by violence (Cal. Penal Code §
11 236), and lewd act upon a child (Cal. Penal Code § 288(c)(1)). Ex. 1 at 4.
12 The trial court sentenced him to state prison for 27 years. *Id.* at 1.

13 On May 23, 2007, the California Court of Appeal affirmed the
14 judgment and remanded for the superior court to correct a clerical error in
15 the abstract of judgment. Ex. 1 at 9. On September 12, 2007, the
16 California Supreme Court denied a petition for review. Ex. 2.

17 On January 28, 2008, petitioner filed a petition for writ of habeas
18 corpus in this Court challenging his state convictions, which this Court
19 denied with prejudice on May 13, 2009. Ex. 3.

20 On August 15, 2022, petitioner filed a motion for resentencing
21 pursuant to California Penal Code sections 1171.1 and 1170(b)(1)-(2). Ex.
22 4. The state superior court denied the motion for resentencing except for
23 striking the one-year prior pursuant to California Penal Code section
24 667.5(b). *Id.* Petitioner is currently litigating his appeal to the California
25 Court of Appeal. Ex. 5.

26 Petitioner filed state habeas petitions in the California Supreme
27 Court in 2007, 2020, and 2023. Ex. 6, 7, 8, 9. The state court denied all
28 petitions except the one filed in 2023, which is still pending.

ECF No. 20, pg. 2.

As Respondent notes, while Petitioner's conviction was once final upon
completion of direct review in state court, Petitioner's resentencing resulted in a new judgment.
See Magwood v. Patterson, 561 U.S. 320, 338-39 (2010); see also Wentzell v. Neven, 674 F.3d
1124, 1127 (9th Cir. 2012). As of the date of filing of Respondent's motion on January 16, 2024,
Petitioner's appeal in the California Supreme Court following resentencing was still pending.
Neither Petitioner's opposition filed on February 7, 2024, nor Petitioner's most recent filing of
April 17, 2024, suggest otherwise. See ECF Nos. 25 and 29. Petitioner also makes no showing
of "special circumstances" warranting federal intervention before the appeal to the California
Supreme Court is resolved. See generally ECF No. 1. Therefore, this Court should abstain and
dismiss this action without prejudice.

Based on the foregoing, the undersigned recommends as follows:

1. Respondent's motion to dismiss, ECF No. 20, be GRANTED.
2. This action be DISMISSED as premature.
3. All other pending motions, ECF Nos. 4, 6, 12, 26, and 27, be DENIED as moot.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the Court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 25, 2024



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE